IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBERT LEE ORANGE, Appellant.	No. 33947-1-II UNPUBLISHED OPINION

Hunt, J. – Robert Lee Orange appeals his conviction for unlawful possession of a controlled substance. He argues that the trial court erred in denying his motion to suppress cocaine found in his pants pocket. We affirm.

Facts

I. Arrest

On August 6, 2005, police officers Brian Kim and Albert Schultz were patrolling Tacoma's Hilltop neighborhood, which is considered a high crime area. The officers were in uniform and drove a marked patrol car.

Shortly after 2:00 a.m., they noticed a van parked near the intersection of 13th and

Fawcett; the van had not been there during their previous patrol through the neighborhood. Based on their experience in the area, the officers considered the sudden appearance of the van slightly suspicious. The van had its lights off, but as the officers drove past, they could see someone inside.

The officers turned their car around and parked behind the van. As they parked, they activated the patrol car's high-beam headlights, spotlight, wig-wag lights, and take-down lights.[1]

While Kim ran a records check on the license plate, Schultz approached the van. Schultz saw a woman lying in the back of the van. Orange was sitting in the front passenger seat. With the aid of his flashlight, Schultz noticed that the ignition column had been damaged in a manner commonly associated with stolen vehicles. When the registration on the van came back clear, Kim joined Schultz beside the van.

The officers recognized the woman in the van as a known drug user and prostitute. Kim observed the woman making furtive movements in the back and asked her to reveal her hands. When she failed to do so, he asked her to open the van's sliding door; she complied. Through the open door, the officers observed extensive drug paraphernalia throughout the van's interior, including what appeared to be new and used syringes, cooking tins with residue, and crack pipes with residue and Brillo. Kim arrested the woman for illegal drug conduct, a violation of Tacoma's municipal code.

As the arrested woman got out of the van, Kim noticed a small, black substance he

[1] The wig-wag lights are red and blue flashing lights that face the rear of the patrol car and make the car more visible to any vehicles traveling in the area. The take-down lights are four white lights on the patrol car's rooftop bar.

believed to be black-tar heroin near the floorboard where she exited the van. This substance field tested positive for heroin.

Kim put the woman in the patrol car and returned to the van, where Schultz was talking with Orange. During that conversation, Schultz saw a plastic bag near Orange's feet that contained a crack pipe with residue. When Schultz asked to whom the bag belonged, Orange said that the bag and its contents belonged to him. On the center console beside Orange, Schultz also saw two cooking tins with burn residue. Schultz asked Orange to step out of the van and told him he was under arrest for illegal drug conduct.

When Schultz told Orange to place his hands on the vehicle, Orange complied with his left hand but used his right hand to shield his right front pants pocket. As Schultz patted him down, Orange refused to comply with the directive to remove his hand from his pocket area. Schultz and Kim then placed Orange in handcuffs. Schultz carefully turned Orange's pocket inside out; and found a small baggy containing crack cocaine.

II. Procedure

The State charged Orange with one count of unlawful possession of a controlled substance. Orange filed a CrR 3.6 motion to suppress, arguing that he had been unlawfully seized and searched. The officers testified to the facts cited above. Orange also filed a Cr R3.5 motion to suppress his statement about his bag.[2] The trial court denied both motions.

Orange waived his right to trial by jury and elected to proceed with a bench trial. The trial court found him guilty as charged.

[2] Orange does not appeal the trial court's denial of his motion to suppress his statement.

Orange appeals.

Analysis

I. Seizure

Orange argues that he was seized in violation of article I, section 7 of the Washington Constitution when uniformed officers parked behind his van, activated several of the patrol car's lights, and approached and questioned him. We disagree.

A. Standard of Review

Article I, section 7 protects a citizen's right to be free from unreasonable search and seizure. *State v. Fields*, 85 Wn.2d 126, 130, 530 P.2d 284 (1975). A warrantless search or seizure is considered unconstitutional unless it falls within one of the exceptions to the warrant requirement. *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004).

A seizure occurs under article I, section 7 when an individual's freedom of movement is restrained and the individual would not believe that he is free to leave or decline a request due to an officer's use of force or display of authority. *State v. O'Neill*, 148 Wn.2d 564, 574, 62 P.3d 489 (2003). This determination is made objectively by looking at the actions of the law enforcement officer. *Rankin*, 151 Wn.2d at 695. Orange has the burden of proving that a seizure occurred in violation of article I, section 7. *State v. Young*, 135 Wn.2d 498, 510, 957 P.2d 681 (1998).

Where the facts are undisputed, as they are here, the determination of whether there is a violation of article I, section 7 is a question of law, which we review de novo. *Rankin*, 151 Wn.2d at 694.

B. No Seizure Prior to Arrest

Article I, section 7 does not forbid social contacts between police and citizens: "[A] police officer's conduct in engaging a defendant in conversation in a public place and asking for identification does not, alone, raise the encounter to an investigative detention." *Young*, 135 Wn.2d at 511 (quoting *State v. Armenta*, 134 Wn.2d 1, 11, 948 P.2d 1280 (1997)). Where an officer suspects the possibility of criminal activity, he may question an individual and ask for identification without violating constitutional protections. *O'Neill*, 148 Wn.2d at 577; *see also Young*, 135 Wn.2d at 511 (effective law enforcement requires not only passive police observation but also police interaction with citizens on the streets).

In *O'Neill*, our state Supreme Court found no seizure where an officer driving a squad car pulled up behind a car parked in front of a store that had been closed for an hour, activated the squad car's spotlight, and then approached the parked car and shined his flashlight into it. 148 Wn.2d at 578. The *O'Neill* Court cited *Young* (1) in holding that the use of a flashlight to illuminate at night what is visible during the day is not an unconstitutional intrusion into a citizen's privacy interests, and (2) in noting that, in *Young*, the Court found no constitutional violation where a police officer shined a spotlight at night on a person in a public street. *O'Neill*, 148 Wn.2d at 578 (citing *Young*, 135 Wn.2d at 513-14). "Mere illumination alone, without additional indicia of authority, does not violate the Washington Constitution." *Young*, 135 Wn.2d at 514.

In evaluating the encounter at issue here, the trial court relied on *O'Neill* in ruling that the officers' use of the patrol car's lights to illuminate the van did not amount to a seizure:

> Here, the only real difference is that they used, apparently, more than their spotlight, but I don't know that that's a significant difference at all. Certainly, there wasn't any evidence that they were using their PA system to demand

> compliance with anything. So, I can't say that there was a seizure at the point that the officers approached the car.

Report of Proceedings (RP) at 84-85.

We agree with the trial court's ruling. We hold that the officers' use of lights to illuminate the scene, and their questioning of Orange while they were in uniform, did not turn their initial encounter with him into a seizure. Accordingly, the trial court properly denied Orange's motion to suppress.

II. Search

Orange next challenges the search of his pants pocket, arguing that it was not a lawful search incident to his arrest and that it exceeded the permissible scope of a weapons frisk. Again, we disagree.

Officers may conduct a search incident to a valid arrest without first obtaining a warrant. *State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996). This exception to the warrant requirement is based on the need to prevent destruction of evidence and the need to locate weapons in the possession of the arrested person. *State v. Johnson*, 128 Wn.2d 431, 447, 909 P.2d 293 (1996).

Orange argues that (1) the search-incident-to-arrest exception is inapplicable because Schultz intended to cite and to release him rather than to place him under custodial arrest;[3] (2) because Schultz intended to release Orange, Schultz was entitled to conduct only a weapons frisk, which is limited in scope to a search of the outer clothing;[4] and (3) therefore, the exception did

[3] *See State v. Parker*, 139 Wn.2d 486, 496-97, 987 P.2d 73 (1999) (in the absence of a lawful custodial arrest, a full-blown search may not be made).

not cover the search of the inside of his pants pocket.

The test for determining whether a custodial arrest occurred is governed not by the officer's intentions but by an objective test. *See State v. Reichenbach*, 153 Wn.2d 126, 135, 101 P.3d 80 (2004). The test is whether a reasonable person would believe that he was under a custodial arrest. *Reichenbach*, 153 Wn.2d at 135. It is the arrest itself, not probable cause to arrest, that constitutes the necessary authority of law for a search incident to arrest. *O'Neill*, 148 Wn.2d at 585-86.

Here, the record shows that although Schultz initially intended to cite and to release Orange, Schultz informed Orange that he was under arrest before ordering him to get out of the van and then to place his hands against the patrol car. Given that Schultz told Orange that he was under arrest and that Orange's companion had also been arrested and placed in the patrol car, it would have been reasonable for Orange to believe that he, too, was being placed under custodial arrest. *See State v. Radka*, 120 Wn. App. 43, 49, 83 P.3d 1038 (2004) (telling suspect he is under arrest suggests custodial arrest unless suspect is also told he may go as soon as citation issued). Consequently, the search of his pocket incident to his arrest was lawful.

In addition, we note that Orange's actions in resisting the pat down of his pants pocket led Schultz to suspect that Orange might have a weapon. As the trial court observed, the officer was not required to abandon the pat down when Orange interfered:

> Now, do you really suggest the officer is to abandon the search? Oh, okay, Mr. Orange, I won't look in there because you don't want me to. At that point, there's obviously the potential for a weapon or something that could harm the officer, and he has every right, in the Court's mind, to go deeper into the pocket.

[4] *State v. Hudson*, 124 Wn.2d 107, 112, 874 P.2d 160 (1994).

RP at 89. We agree. Although a lawful weapons frisk is usually limited to a pat down of exterior clothing, there are situations in which the pat down is inconclusive and where, as here, reaching into the clothing is reasonable. *Hudson*, 124 Wn.2d at 112.

We hold, therefore, that the search of Orange's pocket was justified as a search incident to arrest and, in the alternative, as part of a lawful frisk for weapons.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Houghton, P.J.

Bridgewater, J.